UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

QWEST CORPORATION, a Colorado corporation, Plaintiff, v. THE MINNESOTA PUBLIC UTILITIES COMMISSION, and R. MARSHALL JOHNSON, in his official capacity as a member of the Minnesota Public Utilities Commission; LEROY KOPPENDRAYER, in his official capacity as a member of the Minnesota Public Utilities Commission; PHYLLIS REHA, in her official capacity as a member of the Minnesota Public Utilities Commission; GREGORY SCOTT, in his official capacity as a member of the Minnesota Public Utilities Commission, Defendants.	Civil File No.____________ **COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF TO PREVENT ENFORCEMENT OF PUBLIC UTILITIES COMMISSION ORDERS**

COMPLAINT

Plaintiff, Qwest Corporation ("Qwest"), alleges as follows:

NATURE OF THE ACTION

This action challenges, under the Federal Telecommunications Act of 1996 ("the Act"), 47 U.S.C. § 151 et seq., orders of the Minnesota Public Utilities Commission and its individual members in their official capacities (collectively, "Commission" or "MPUC") finding Qwest knowingly and intentionally violated provisions of 47 U.S.C. §§ 251 and 252 and Minn. Stat. §§ 237.09; 237.60, subd. 3; 237.121, subd. 5 and ordering monetary penalties and restitutional remedies against Qwest for those violations. *See Findings of Fact, Conclusions, Recommendation and Memorandum*, September 20, 2002 (attached as Exhibit A); *Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies*, November 1, 2002 (attached as Exhibit B); *Order Assessing Penalties*, February 28, 2003 (attached as Exhibit C); *Order After Reconsideration on Own Motion*, April 30, 2003 (attached as Exhibit D); *Order Denying Qwest's Second Request for Reconsideration*, May 21, 2003 (attached as Exhibit E).

This case presents the important question of whether a State commission can disregard federal law in ordering remedies for violations of the Act. The Commission's orders, particularly those concerning penalties and remedies, consistently and openly abandoned federal law. Although the Commission found that Qwest had violated provisions of Sections 251 and 252 of the Act – and although the liability phase focused exclusively on the requirements of Sections 251 and 252 – in considering remedies the Commission explicitly ignored the requirements of the Act and instead crafted solely state-law-based remedies, which conflict with the requirements and purpose of the Act.

Even judged solely under state law, the Commission's orders -- such as ordering "restitutional remedies" without taking any evidence regarding actual harm suffered or considering the legal elements of restitution -- are arbitrary, capricious, and not supported by substantial evidence. Moreover, as discussed below, the Commission found that Qwest knowingly and intentionally violated the filing requirement of 47 U.S.C. § 252(a) for each and every agreement at issue, despite the fact that the full scope of this filing requirement had not been previously articulated by the FCC, any court, or any State commission. The Commission further found that by failing to file the agreements in question, Qwest discriminated against local telephone carriers in the provision of local telephone services under 47 U.S.C. § 251 and state laws, despite the fact that the Commission did not receive any evidence of actual discriminatory harm suffered by other local telephone carriers.

As a party aggrieved by the Commission's orders in interpreting the filing requirement of Section 252(a) and taking action to enforce violations of that requirement, Qwest now brings this action for judicial review under the Act to resolve the pressing federal question concerning the structure and operation of the framework for regulating local telephone services. *See* 47 U.S.C. § 252(e)(6) ("In any case in which a State commission makes a determination under this section [47 U.S.C. § 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of Section 251 and this section"); 47 U.S.C. § 1331.

PARTIES

1. Qwest Corporation is a Colorado corporation with its principal place of business at 1801 California Street, Denver, Colorado 80202. Qwest is an Incumbent Local Exchange Carrier ("ILEC") as defined in 47 U.S.C. § 251(h) that provides local telephone service in Minnesota and 13 other mid-western and western states.

2. Defendant Minnesota Public Utilities Commission is a governmental body organized under the laws of the State of Minnesota with authority to regulate telecommunications carriers providing intrastate service in Minnesota. The Commission is headquartered at 121 7th Place E., Suite 350, St. Paul, Minnesota 55101-2147. The Commission is a "State commission" within the meaning of 47 U.S.C. §§ 153(41), 251 and 252.

3. Defendants R. Marshall Johnson, LeRoy Koppendrayer, Phyllis Reha, and Gregory Scott are the current members of the Commission and are named in their official capacities for declaratory and injunctive relief only.

JURISDICTION AND VENUE

4. This action arises under the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act"), 47 U.S.C. §§ 151-614 and the United States Constitution. This Court has jurisdiction over Qwest's claims under the Act pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. This Court has jurisdiction over Qwest's claims under the United States Constitution pursuant to 28 U.S.C. § 1331. This court has jurisdiction over any state law claims under 47 U.S.C. § 252(e)(6), 28 U.S.C. § 1331, and 28 U.S.C. § 1367.

5. Venue is proper in this Court under 28 U.S.C. §§ 1391(a)(1) and (a)(2) because one or more Defendants reside in this District and a substantial part of the events giving rise to the claims occurred in this District.

INTRODUCTORY ALLEGATIONS

A. Telecommunications Act of 1996

6. In February 1996, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104, 110 Stat. 56, which amended the Communications Act of 1934. The Act is a dramatic departure from prior approaches to the regulation of local telephone service as it is designed to encourage competition in the local and long-distance markets and it sets forth a comprehensive federal scheme to foster competition in local telephone markets.

7. The Act shifts the regulation of local telephone services from being primarily a product of state law and regulations to being primarily a product of federal law and regulations. As both the Supreme Court and the Eighth Circuit have noted: "The question ... is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has."

Southwestern Bell Tel. Co. v. Connect Commun. Corp., 225 F.3d 942, 946-47 (8th Cir. 2000) (*quoting AT&T Corp. v. Iowa Util. Board*, 525 U.S. 366, 379 n.6 (1999)).

8. Qwest merged with U S WEST, one of the regional bell operating companies, in 2000 and as a result took over the ownership and operation of the infrastructure in place to provide local telephone services in a fourteen-state region, including Minnesota. Section 251 of the Act requires ILECs, such as Qwest, to allow Competitive Local Exchange Carriers ("CLECs"), which compete with ILECs and one another to provide local phone services to end-user consumers, to interconnect to their networks.

9. Instead of outlining detailed tariffs and/or other regulatory descriptions of exactly how the interconnection of networks should be carried out, Section 252 of the Act encourages ILECs, the owners of the local infrastructure, and CLECs, the companies seeking access to that infrastructure, to negotiate "interconnection agreements" and requires that those agreements be submitted to State utilities commissions for approval. 47 U.S.C. § 252.

10. Section 251(b) imposes a number of obligations upon all local exchange carriers, including the duties to provide or allow the resale of telecommunications services; to provide number portability, dialing parity, and access to rights of way; and to establish reciprocal compensation arrangements with other carriers. Section 251(c) imposes additional obligations on ILECs, such as Qwest. Pursuant to Section 251(c), ILECs have a duty to negotiate agreements to provide interconnection, unbundled network elements, collocation, and resale in accordance with Section 252. In addition, Section 251(c) imposes upon ILECs a duty not to discriminate in providing interconnection services to CLECs, stating that such service must be on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with

the terms of the parties' interconnection agreement and the requirements of Sections 251 and 252 of the Act.

11. In addition to obligating an ILEC to negotiate agreements for "interconnection, services, or network elements pursuant to section 251," Section 252(a) states that such interconnection agreements shall be submitted to the appropriate State commission(s) for approval.

12. Although Section 252 sets forth the process by which ILECs and CLECs establish interconnection agreements, neither that section nor any other defines the scope of interconnection agreements. Rather, Section 252 merely states that any interconnection agreement entered into by an ILEC and CLEC "shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement" and that such agreement must be filed with the relevant State commission(s), which may approve or reject the agreement. 47 U.S.C. § 252(a) and (e).

13. Section 252(i) of the Act allows CLECs that are not parties to a particular agreement to opt into the interconnection service(s) or network element(s) provided under that agreement. By opting into provisions from another interconnection agreement, a CLEC may make such provisions part of its own interconnection arrangement with the ILEC.

14. When exercising opt-in rights under Section 252(i), a CLEC may not select only those provisions of an interconnection agreement that are most desirable to it. Instead, as the FCC has stated: "section 252(i) mandates that the availability of publicly-filed agreements be limited to carriers willing to accept the same terms and conditions as the carrier who negotiated the original agreement with the incumbent LEC." *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 16139,

16140 (1996) ("*First Report and Order*"). The FCC continued: "For instance, where an incumbent LEC and a new entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily entitle a third party to receive the same rate for a three-year commitment. Similarly, that one carrier has negotiated a volume discount on loops does not automatically entitle a third party to obtain the same rate for a smaller amount of loops." *First Report and Order*, 11 FCC Rcd 15499, 16139 ¶ 1315.

15. A CLEC seeking to exercise its opt-in rights is required to abide by "the same terms and conditions, in addition to rates, as those provided in the agreement." *See* 47 C.F.R. § 51.809(a). The Supreme Court has explicitly upheld this aspect of the FCC's interpretation of Section 252(i). *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999). If the CLEC cannot meet these other terms and conditions, the CLEC has no right under Section 252(i) to opt into the pricing term in isolation.

16. Under the Act, a State commission may establish or enforce "other requirements of state law" in reviewing interconnection agreements under Section 252 and administering the requirements of Section 251, so long as those requirements do not conflict with federal law. 47 U.S.C. §§ 251(d)(3), 252(e)(3).

17. While State commissions have the initial responsibility to review interconnection agreements for approval or rejection and to enforce the provisions of the Act in this regulatory scheme, their authority to conduct such review and engage in enforcement proceedings is a product of federal law and regulations.

18. Underscoring the federal nature of the review and enforcement of interconnection agreements, Section 252(e) provides that any party aggrieved by a determination under Section 252 may bring an action in federal district court to review the State commission decision.

19. Before the commencement of the adversarial docket before the Commission that is the subject of this Complaint, neither the FCC, any court, nor any State commission had provided a definition outlining which contracts between an ILEC and a CLEC constitute "interconnection agreements" that must be filed with a State commission pursuant to Section 252 of the Act.

20. In response to this void in legal authority, and based upon Section 252's emphasis on a detailed schedule of itemized charges, Qwest interpreted the language of Section 252 to mean that the following types of agreements did not require filing as interconnection agreements: (I) agreements defining general business relationships and business-to-business procedures unique to the particular carriers; (II) settlement agreements; and (III) agreements regarding services or facilities that are not subject to Sections 251 or 252 of the Act.

21. After the proceeding below began in Minnesota, in which the Minnesota Department of Commerce alleged that eleven agreements constituted "interconnection agreements" that should have been filed with the state commission under Section 252, Qwest filed a declaratory relief petition with the FCC to obtain a consistent, nationwide standard for when a contract between an ILEC and a CLEC must be filed as an interconnection agreement. On October 4, 2002, after the liability phase of the Minnesota proceeding, the FCC issued its decision granting Qwest's petition in part by issuing a definition of an "interconnection agreement" that must be filed under Section 252, but denying it in part by not adopting Qwest's proposed definition. For the first time since passage of the 1996 Act, the FCC stated that "any agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements or collocation . . . must be filed pursuant to Section 252(a)(1)." *FCC Memorandum*

Opinion and Order, October 4, 2002, at 5 ("*FCC Order*") (emphasis in original) (attached as Exhibit F). The FCC agreed with Qwest that settlement agreements with solely retrospective consideration, and order and contract forms used by CLECs to request service, do not need to be filed. Further, the FCC stated that unless dispute resolution and escalation provisions are "generally available" to CLECs, through a web site for example, such provisions are terms of interconnection that should be filed under Section 252, thereby stating that if certain terms and conditions are "generally available," they do not have to filed with the State commissions.

B. History of the Unfiled Agreements Enforcement Proceeding

22. On February 14, 2002, the Minnesota Department of Commerce ("DOC" or "Department") filed a complaint with the Commission alleging that Qwest failed to properly file certain provisions of eleven interconnection agreements with CLECs and thus acted in a discriminatory and anti-competitive manner.

23. On March 12, 2002, the Commission issued its *Notice and Order for Hearing* instituting a contested case proceeding to investigate the alleged unfiled agreements. This order identified four issues to be addressed by an Administrative Law Judge ("ALJ"):

I. Whether the agreements, or any portion thereof, needed to be filed with the Commission for review;

II. whether they were filed under other settings;

III. whether there were any exculpatory reasons why they were not filed; and

IV. whether disciplinary action/penalties were appropriate.

24. From April 29, 2002 to May 2, 2002, an evidentiary hearing was held before an ALJ regarding the eleven agreements ("Liability Hearing").

25. On May 24, 2002, the DOC filed a petition with the ALJ to reopen the record and admit evidence concerning an alleged oral agreement between Qwest and McLeodUSA Incorporated ("McLeod"), a CLEC. The ALJ granted the petition.

26. On August 6, 2002, the ALJ held a hearing regarding the alleged oral agreement with McLeod.

27. On September 20, 2002, the ALJ submitted his *Findings of Fact, Conclusions, Recommendation and Memorandum* ("*ALJ Report*") to the Commission. The *ALJ Report* considered the parties' proposed standards of an "interconnection agreement," decided upon a standard, and then found that Qwest knowingly and intentionally violated that standard and the non-discrimination requirements of Section 251 of the Act by failing to file certain provisions of the twelve agreements in question. The *ALJ Report* further found that penalties were justified under Minnesota's penalties statute, Minn. Stat. § 237.462.

28. On November 1, 2002, the Commission issued its *Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies* ("*Liability Order*"). The *Liability Order* adopted the *ALJ Report* in its entirety. The *Liability Order* also held that, on the same findings of fact in the *ALJ Report*, Qwest had violated the state anti-discrimination laws, Minn. Stat. §§ 237.09; 237.60, subd. 3; 237.121, subd. 5.

29. During a hearing on November 19, 2002, the Commission requested that Qwest submit a proposed remedy plan that would include, in lieu of a penalty authorized by Minn. Stat. § 237.462 or in exchange for a reduced penalty, commitments by Qwest to the state of Minnesota. The Commission formalized that request in an order issued on December 18, 2002, and Qwest filed a proposed plan on December 19, 2002. On February 4, 2003, a hearing was held before

the Commission to consider Qwest's remedy proposal and the responses of various parties ("Penalty Hearing").

30. At the hearing on February 4, the Commission rejected Qwest's remedy proposal. Rather than issue an order based on the issues litigated in the proceeding, the Commission proceeded to craft its own remedy order and determined a fine for the purpose of forcing Qwest to agree to the remedies it ordered. On February 28, 2003, the Commission issued its *Order Assessing Penalties* ("*Penalty Order*"). The Commission levied a total fine of $25,955,000 ($10,000/day for the two agreements found to contain discounts on rates; and $2,500/day for the remaining ten agreements). The Commission further ordered Qwest to take several "corrective actions." These included: making all provisions of the twelve agreements available to all Minnesota CLECs; providing in cash or credit to all Minnesota CLECs the equivalent of a 24-month 10% discount on all Minnesota services that they purchased between November 15, 2000, and November 15, 2002; providing a 10% discount on all Qwest products and services provided in Minnesota to each CLEC on a going forward basis for 24 months commencing with the date of the *Penalty Order*; and providing certain per-line credits to each CLEC. Finally, the Commission ordered that the $25.955 million penalty would be stayed if Qwest complied with the corrective actions.

31. On March 10, 2003, Qwest filed a petition for reconsideration of the *Penalty Order*. McLeod and Eschelon, two of the CLECs that were party to many of the agreements at issue, filed petitions for reconsideration of the *Penalty Order* on March 20, 2003.

32. On April 8, 2003, the Commission held a hearing on the motions for reconsideration. At the April 8 hearing, the commissioners introduced their own motion for reconsideration, and the Commission orally decided to modify its order.

33. On information and belief, during the process of drafting the written order, confusion arose within the Commission regarding the intent of the decision reached on April 8. Thus, on April 14, 2003, a hearing was held before the Commission, on the Commission's own motion, to further consider the remedies and penalties.

34. On April 30, 2003, the Commission issued its *Order After Reconsideration on Its Own Motion* ("*Penalty Order II*"). In *Penalty Order II,* the Commission denied the motions for reconsideration by Qwest, Eschelon, and McLeod, but modified several aspects of the penalties on the Commission's own motion. The Commission eliminated the 24-month prospective discount; excluded interstate access services from the retrospective discount and shortened the time frame for that discount from 24 to 18 months; ordered that the per-line credits should be offset by the amount any CLEC was actually able to bill its customers for the originating and terminating access services to which the per-line credits applied; and established a timeline for determining these credits.

35. On May 12, 2003, Qwest filed a motion for reconsideration of *Penalty Order II.*

36. On May 21, 2003, the Commission issued its *Order Denying Qwest's Second Request for Reconsideration.*

37. The remedies ordered by the Commission break down as follows:

I. A total fine of $25.955 million, allocated as follows among the twelve agreements, which are listed here in the manner in which they were referred to in the Department's Complaint:

   i. Eschelon I - $1,870,000
   ii. Eschelon II - $1,470,000
   iii. Eschelon III - $1,177,500
   iv. Eschelon IV - $4,710,000
   v. Eschelon V - $602,500
   vi. Eschelon VI – $532,500

vii. Covad - $1,702,500
viii. Small CLECs - $1,680,000
ix. McLeod I - $1,680,000
x. McLeod II - $1,227,500
xi. McLeod III - $6,940,000
xii. US Link/InfoTel - $2,402,500

II. Payment to CLECs, by cash or credit, of the equivalent of a 10% discount on all Minnesota products, except interstate access services, that the CLECs purchased from Qwest between November 15, 2000 and May 15, 2002.

III. Payment, in cash or credit, of $2 per access line purchased for the time period that Eschelon V was in effect, offset by the amount collected by the CLECs from Qwest for terminating access services on each line.

IV. Payment of a $13 (for the duration that Eschelon IV was in effect) and/or a $16 (for the duration that Eschelon V was in effect) per-line credit to each affected CLEC for each month Qwest did not provide accurate daily usage information to a CLEC, offset by the amount the CLEC was able to bill its customers for originating and/or terminating access services.

C. The Commission Crafted the Remedies and Penalties Without Regard for the Federal Statutory Requirements and Regulatory Scheme

38. Although the Commission found that Qwest had violated provisions of Sections 251 and 252 of the Act by not filing the agreements in question for State commission approval – and although the liability phase focused exclusively on these requirements of Sections 251 and 252 – in considering remedies the Commission explicitly ignored the requirements of the Act and instead crafted solely state-law-based remedies, which conflict with the requirements and purpose of the Act.

39. At the February 4, 2003 Penalty Hearing, the Commission for the first time stated that in the remedial phase it was not applying federal law but rather was acting under "state law remedial authority." The Commission also stated that it was applying its state law remedial authority without regard to the requirements of Sections 251 and 252 of the Act. At the hearing on the petitions for reconsideration of the *Penalty Order*, the Commission stated that it could impose a penalty or restitutional remedy that "goes beyond 251 and 252" for a violation of state law.

40. In *Penalty Order II,* dated April 30, 2003, in response to Qwest's repeated requests that the Commission comply with the Act in fashioning penalties, the Commission stated that it was basing what it referred to as "restitutional remedies" solely upon state law, citing Minn. Stat. §§ 237.06, 237.081, 237.461, 237.462 as the legal underpinning for the ordered remedies. Other than monetary penalties under Section 237.462, none of the remedies ordered by the Commission are specifically authorized by state law.

41. Under Section 252(i), CLECs could not have suffered damages from an unfiled agreement unless they would have been able to accept all burdensome terms directly related to the beneficial terms in the agreement. By ignoring those Section 252(i) requirements, the Commission awarded CLECs restitutional remedies without any proof that the CLECs suffered any harm or discrimination under the Act.

42. In *Penalty Order II*, the Commission also failed to take any evidence to establish the legal elements necessary to support a restitutional remedy under state or federal law, or to even consider what legal elements must be satisfied to support a restitutional remedy under state or federal law.

43. The record in the penalty phase of this proceeding demonstrates that, when selecting the $25.955 million amount for the monetary penalty, the Commission was motivated by a desire to coerce Qwest into accepting the other corrective remedies that exceeded the Commission's authority, rather than following the statutory requirements of Minn. Stat. § 237.462 and the regulatory scheme defined by Sections 251 and 252 of the Act.

44. At the February 4, 2003 penalty hearing, the Commission initially proposed fine amounts of $10,000/day for the two agreements that were found to contain discounts, and $100/day for the remaining ten agreements. This would have resulted in a total penalty of $12.2 million.

45. The Commission expressed concern that this amount was not sufficiently high to coerce Qwest to provide a 24-month forward-looking discount based upon unfiled provisions that had been terminated and were no longer in effect, and that would have required Qwest to discriminate against certain CLECs. Based on this desire to coerce Qwest to provide a 24-month forward-looking discount, and without any legal or factual justification, the Commission increased the fine amount for the ten agreements from $100/day to $2,500/day, increasing the total penalty to $25.955 million. In so doing, the Commission arbitrarily and without any legal or factual justification selected a higher per day penalty for ten of the twelve agreements. The Commission allowed for a stay of this monetary penalty, provided Qwest complied with all "corrective actions" listed in the Order (including the prospective discount).

46. When Qwest moved for reconsideration of the *Penalty Order* and again, this time in writing, alerted the Commission to the legal infirmities of the "corrective actions," particularly the 24-month prospective discount, the Commission, on its own motion for reconsideration, eliminated the forward looking discount, but also eliminated the opportunity for Qwest to obtain

a stay of any portion of the $25.955 million penalty. That is, after Qwest objected to the Commission's increasing the penalty from $12.2 million to $25.9 million to coerce Qwest to abide by improperly ordered remedies, which was subject to a permanent stay if Qwest complied, the Commission ordered Qwest to pay the entire $25.9 million, as well as abide by orders to provide remedial credits and other payments.

47. At the February 4, 2003 penalty hearing during which the amount of the $25.9 million penalty was established, the Commission did not consider the statutory factors of Minn. Stat. § 237.462 for determining the amounts of any monetary penalties. Instead, it focused on imposing a penalty high enough to force Qwest into accepting the 24-month prospective discount. Nor did the Commission consider how the amount of the monetary penalty was affected by the federal regulatory scheme under the Act. In light of this, the discussion of the state statutory factors in the written *Penalty Order* issued three weeks later amounts to little more than a secondary, post hoc rationalization for the monetary penalties.

48. Even the discussion of the state statutory factors in the *Penalty Order* did not apply the factors to each agreement, and the record does not support a finding that the most significant elements supporting a higher penalty -- including harm to CLECs or customers, discrimination and intent -- applied to each of the agreements in question (particularly the non-monetary agreements).

D. The Commission Did Not Receive Evidence Showing Discrimination or Harm Was Caused by the Failure to File the Agreements

49. The agreements at issue addressed such topics as: the frequency of executive level meetings, the process for escalating and resolving disputes, the standards by which Qwest's service to the CLEC customer would be measured, and the methods by which Qwest would address service problems the CLEC was experiencing. Qwest also agreed to provide one CLEC

with credits to settle disputes regarding the accuracy of the billing and usage information provided by Qwest to the CLEC. In addition, the Commission found that Qwest agreed to provide discounts on services to two CLECs.

50. The Commission's conclusion that these agreements violated the anti-discrimination provisions of 47 U.S.C. § 251 and Minn. Stat. §§ 237.09; 237.60, subd. 3; 237.121, subd. 5 was based on a *per se* theory of discrimination. The Commission found that each and every unfiled agreement resulted in discrimination to non-party CLECs without receiving any evidence regarding harm suffered by the non-party CLECs. In doing so, the Commission ignored the purpose and structure of the Act as well as the unrebutted evidence that the terms of many of the agreements were available to CLECs through other means.

51. Section 252(i) of the Act prevents discrimination in the provision of interconnection services by allowing CLECs to opt into the terms of interconnection agreements. However, CLECs that wish to obtain the benefits of an interconnection term favorable to them must also accept the burdens of all terms that are related to that favorable term. Under the regulatory structure established in Section 252(i), a CLEC cannot suffer discrimination as a result of losing the opportunity to opt into a favorable term of an interconnection agreement if the CLEC would not, or could not, accept all additional terms related to the favorable term.

52. Applying only the per se theory of discrimination, the Commission did not receive or consider any evidence at the liability stage concerning whether any of the CLECs that were not parties to the various agreements could have satisfied the requirements of Section 252(i). Thus, the Commission found the unfiled agreements caused discrimination without receiving any evidence that other CLECs would or could have opted into the agreements if they had been filed.

53. For example, for the "discount" agreements (Eschelon IV and McLeod III), there was no evidence that any other CLEC would or could accept the terms directly related to the "discount" contained in each agreement. The related terms in these agreements with Eschelon and McLeod included a commitment to purchase an entirely new UNE-Star service platform that only those two CLECs had selected and substantial, multi-year purchase commitments of $150 million for Eschelon and $480 million for McLeod. Without any evidence regarding whether any CLEC could or would have accepted these related terms, there can be no legally supportable finding that the agreements found to contain the discounts caused any discrimination.

54. Further, based on this theory of *per se* discrimination, the Commission found agreements resulted in discrimination not only without any affirmative evidence that discrimination occurred, but also in the face of unrebutted evidence to the contrary. Even if the agreements at issue fall within the filing requirements of the 1996 Act, the mere fact that their terms are memorialized in contracts with some CLECs but not with others is not discrimination in violation of the Act or state law. Evidence must be produced establishing that in fact the non-party CLECs received rates or services inferior to those contained in the agreements in question (and that the CLECs could have satisfied the requirements of the Section 252(i) opt-in process).

55. For example, Qwest presented substantial evidence that Covad did not receive any preferential service as a result of the Covad Service Level Agreement (an April 2000 agreement defining standards by which Qwest's service to Covad would be measured), and, thus, that other CLECs suffered no discrimination as a result of the Covad agreement. Qwest witnesses Kathleen Lucero, Vice President in the Local Network Organization, and Kenneth Beck, Executive Director of Wholesale Customer Operations, gave testimony that the Covad service goals were implemented for all CLECs, not just Covad. In addition to the testimony of

Ms. Lucero and Mr. Beck, Qwest's internal process documents reflect nondiscriminatory implementation of the service goals outlined in the Covad Service Level Agreement.

56. The Department did not introduce any evidence to support a finding that the Covad agreement caused discrimination or harm. The Department did not present evidence that Covad was given superior service, and none of the testifying CLECs asserted that they received service inferior to that given to Covad.

57. In another example, without any affirmative evidence and ignoring all evidence to the contrary, the Commission found that discrimination occurred as a result of Qwest's failure to file provisions in Eschelon Agreements I and II related to situating Qwest service personnel at Eschelon facilities. Among the evidence ignored by the Commission was the fact that a description of Echelon's on-site service manager was publicly available in an agreement filed with the Commission on December 6, 2000, and approved as Amendment 8 to the Eschelon Interconnection Agreement. The evidence showed that not one single CLEC, despite the public disclosure of an on-site team and despite the CLEC witnesses' vague expressions of interest in an on-site team, has requested that a service manager be placed at their offices since the public disclosure of that term in December 2000. Additionally, the unrebutted evidence demonstrated that regardless of where a customer's service manager's desk is or to whom a service manager is assigned, every service manager performs the identical functions and uses the identical processes to identify root causes and trends, recommend action plans, and identify initiatives already in place to improve service.

58. Similarly, no evidence was received to support the Commission's finding that Minnesota CLECs were discriminated against by the failure to file a reciprocal compensation settlement contained in Eschelon Agreement I. This provision provided that compensation for

terminating internet traffic would be exchanged between U S WEST and Eschelon's networks at the most favorable rates available. The unrebutted evidence showed that CLECs did not suffer discrimination because, in fact, rates paid under this agreement between Eschelon and Qwest were the same as those that were publicly available and on-file with the Commission in Eschelon's approved interconnection agreement and therefore available to every single CLEC operating in Minnesota.

59. The Commission also ignored evidence that Eschelon did not receive better service by virtue of provisions contained in Eschelon Agreement VI, which established weekly meetings of the Qwest service management team, procedures for escalating service problems, and procedures for tracking and reporting the level of Qwest's service to Eschelon. The unrebutted evidence showed that all of Qwest's CLEC customers received equivalent or comparable service depending upon their requests and needs.

60. The Commission also ignored evidence that no CLEC suffered discrimination as a result of the provisions in Eschelon III and VI and McLeod II relating dispute resolution procedures. Dana Filip Crandall, then Qwest's Senior Vice-President for Global Service Delivery, testified that Qwest used the same processes for escalating disputes with all CLECs. Not one Department witness could identify a single example of Ms. Crandall or other senior management refusing to handle an escalation because a CLEC did not have an escalation agreement or for any other reason. Indeed, there was no specific instance of discrimination, *i.e.*, Qwest's failure to meet with CLECs other than Eschelon or refusing to escalate a matter beyond the vice president level.

61. The Commission also ignored the fact that provisions like those in Eschelon Agreements III and VI and McLeod Agreement II were publicly available for CLECs to opt into

in a filed Interconnection Agreement with AT&T. Section 14 of Attachment 7 to the *Agreement for Local Wireline Network Interconnection and Service Resale* between AT&T and U S WEST contains an escalation process for billing disputes. In addition, Paragraph 1.6 of Attachment 11 to the *Agreement for Local Wireline Network Interconnection and Service Resale* between AT&T and U S WEST states in part, "USWC senior leadership shall assure USWC's active interaction with AT&T on at least a quarterly basis." Any CLEC could opt into those provisions and therefore did not suffer discrimination as a result of the non-filing of the agreements here.

62. In each of the above instances, the Commission did not reject evidence presented by Qwest in favor of more persuasive or credible evidence that discrimination occurred. Rather, it ignored the evidence presented in favor of applying its legally incorrect theory of *per se* discrimination.

63. The only evidence offered by the DOC at the Liability Hearing to prove that discrimination resulted from the agreements in question was the speculative testimony of CLEC witnesses that they might have been interested in "*possibly* adopting" one or more of the unfiled agreements' terms, not that they actually would have or could have opted into them. For example, Robert McMillin, Senior Director -- Interconnection for New Edge Network, Inc., testified only that "New Edge would definitely have been interested in carefully reviewing, and *possibly* opting into, the terms of the Covad Agreement." Similarly, Gregory Bullard, President for Choicetel, LLC, could not be any more definitive than to say that the provisions regarding a dedicated on-site provisioning team "should have been available for my company to consider and *possibly* adopt."

64. No evidence was received regarding whether these CLEC witnesses received the same level of services as those in the Covad agreement (other than testimony of Qwest witnesses

that all CLECs received the same level of service). No evidence was received regarding whether the CLEC would have or could have accepted the conditions necessary to obtain an on-site provisioning team by paying for the cost of that service as required by the relevant agreement (which amounted to more than $9,000 per month for Eschelon).

E. The *Liability Order* Violated the Fair Notice Doctrine By Finding a Knowing and Intentional Violation Despite the Absence of Any Previously Articulated Standard for Filing Interconnection Agreements

65. The fair notice doctrine is a "well-established rule in administrative law that the application of a rule may be successfully challenged if it does not give fair warning that the allegedly violative conduct was prohibited." *United States v. Chrysler Corp.*, 158 F.3d 1350, 1355 (D.C. Cir. 1998). The doctrine is thoroughly incorporated into administrative law and is grounded in the due process clause of the United States Constitution.

66. Section 252(a) of the Act requires that all interconnection agreements must be filed with State commissions for approval, but the Act does not define the scope of this filing requirement or of what types of agreements constitute interconnection agreements. No court or regulatory body had further defined the scope of the Section 252(a) filing requirement or the term "interconnection agreement" beyond the bare language in the Act. And, based on the language of the Act, Qwest could not reasonably have anticipated that many of the agreements at issue would fall within Section 252's filing requirement.

67. Moreover, the DOC did not even formulate its own proposed standard for the scope of the Section 252 filing requirement until after it filed the complaint initiating the proceeding before the Commission. Mr. Deanhardt, the DOC expert witness/co-counsel, admitted that his test for determining what interconnection agreements must be filed is not set forth in the 1996 Act and has never been articulated or endorsed by the FCC.

68. It was undisputed at the hearing that none of the parties' proposed tests for determining what must be filed under Section 252(a) of the Act was contained in the Act.

69. It was undisputed at the hearing that no court had established a standard for what voluntarily negotiated agreements must be filed under Section 252(e).

70. Based on this, the *ALJ Report* acknowledged that no standard for filing voluntarily negotiated agreements under Section 252 existed during the relevant time period and that no regulatory authority had defined the term "interconnection agreement," stating: "[t]here is no statutory definition for the term 'interconnection agreement,'" and "[s]everal different definitions have been proposed in this hearing." *ALJ Report*, Findings of Fact at 8. The *ALJ Report* contradicted this fact when it later opined that, "the Act, the FCC and the Commission have all given broad but clear guidance as to what an interconnection agreement is." *Id.* There was no guidance in any existing rules or laws suggesting that many of the provisions – such as terms related to escalation procedures for disputes, quarterly executive meetings, and other day-to-day operational matters – fall within the Act's filing requirements. Yet, the Commission and the ALJ found that Qwest committed knowing and intentional violations of its filing obligations with regard to every agreement at issue, making no distinctions as to the degree to which Qwest knew or should have known that different provisions were subject to Section 252.

F. Procedural Mistakes in the Liability Phase

71. Much of the case presented against Qwest during the liability phase of the proceeding was dependent upon the testimony and preparatory work of the DOC's "expert" witness, Clay Deanhardt.

72. Despite Qwest's repeated written and oral objections, the DOC's expert was permitted to give summary factual testimony about events and documents about which he had no

personal knowledge. Mr. Deanhardt lacked any first-hand knowledge of the intent of Qwest or any of the CLECs involved in the filing decisions -- he has never worked at Qwest or for any CLEC other than Covad Communications Company ("Covad") and cannot have been privy to the parties' motivations or their understanding of the filing standard -- and yet he repeatedly offered his opinion regarding Qwest's knowledge and intent. Mr. Deanhardt did not even have any first-hand knowledge of the one agreement between Qwest and Covad that was at issue, as he conceded that he was not involved with the negotiations of that agreement and never suggested that he was involved in any discussions with Qwest representatives regarding whether that agreement was subject to the filing requirement of Section 252 of the Act.

73. In the reopened evidentiary hearing on August 6, 2002, Mr. Deanhardt offered further extensive testimony about factual matters that were not suitable for expert testimony. Mr. Deanhardt opined that Qwest's discovery responses -- and witnesses' testimony -- were not credible. He reached conclusions about the nature and terms of the agreements between Qwest and McLeod. He stated his views of the weight that should be ascribed to different pieces of evidence. He speculated as to the intentions of Qwest employees and opined as to their credibility. In addition, Mr. Deanhardt summarized the testimony of two McLeod employees, pointing out what he believed to be the most important portions. When he was not speculating about these issues, the rest of his testimony was devoted to walking through documents, one at a time, summarizing their contents and stating his own interpretations and conclusions regarding those documents.

74. Compounding the procedural injustice of allowing this prejudicial testimony from an "expert" with no first-hand knowledge of the facts is that, for the matters that were actually suitable for expert testimony, Mr. Deanhardt was not adequately qualified to serve as an expert

witness. Mr. Deanhardt began his career as a telecommunications lawyer in January 1999, when he left his position as a litigation associate at a Palo Alto law firm to take an in-house position at Covad. Mr. Deanhardt learned what he knows about telecommunications business practices in the twenty months he spent at Covad as a lawyer, where he was a self-described "jack of all trades," before he left to take a job with a start-up internet company. When he left that position after ten months, he opened his own consulting firm, in which his work through the time of the Liability Hearing was limited to one client – the Minnesota Department of Commerce – and one investigation – the unfiled agreements matter, which is the subject of this complaint, and related public interest proceedings.

75. Even during his tenure at Covad, Mr. Deanhardt worked on only a handful of interconnection agreements; further, he did not negotiate interconnection agreements that contain provisions like the ones at issue before the Commission, such as clauses related to dedicated provisioning services and consulting services. Mr. Deanhardt also never negotiated or implemented any buyer-side take or pay agreements like the agreement between Qwest and McLeod that was the subject of the August 6, 2002 evidentiary hearing, yet he made pronouncements about the typical terms of such agreements.

76. In fact, there was virtually no subject on which Mr. Deanhardt did not offer his opinion. Despite not having any accounting background, Mr. Deanhardt offered his opinions about the application of Generally Accepted Accounting Principles. Despite having limited telecommunications business experience, Mr. Deanhardt repeatedly referred to the typical business practices in the telecommunications industry.

77. Mr. Deanhardt also offered legal testimony regarding Section 252's filing standard, testifying as to an interpretation of the Section he admitted he had not formulated until

after he drafted the Department's Complaint. Indeed, the filing standards proposed by the Department changed several times over the course of the proceeding, beginning with a "you know it when you see it" standard articulated at a pre-trial hearing and culminating in a wholly new filing standard articulated for the first time in the Department's post-hearing brief.

78. Mr. Deanhardt's extensive role in the case showed that he was actually functioning as co-counsel for the DOC, rather than as an expert witness. Mr. Deanhardt, a lawyer by training, drafted discovery requests to Qwest, reviewed discovery responses provided by Qwest, drafted the Complaint to the Commission, wrote the affidavits for most of the Department's witnesses, and wrote his own direct testimony in the form of a legal brief. In his supplemental testimony, Mr. Deanhardt stated that he drafted the discovery requests the Department sent to Qwest and McLeod; reviewed all of Qwest's responses; interviewed witnesses from McLeod; and attended the depositions of both Qwest and McLeod witnesses. In addition, Mr. Deanhardt admitted that he drafted the affidavits of the two employees of McLeod, the CLEC that was party to three of the agreements at issue, upon which he relied heavily in his own testimony.

79. The other exhibits or testimony offered by the Department's other witnesses were irrelevant to a determination of Qwest's knowledge or intent. The witnesses from Minnesota CLECs repeatedly conceded their lack of personal knowledge regarding the negotiation and implementation of the agreements at issue. These witnesses could not provide admissible first-hand testimony regarding the factors that contributed to the parties' filing decisions and could not serve as the evidentiary basis for a conclusion that Qwest knowingly or intentionally violated Sections 251 or 252 or the Act.

COUNT I

The Order to Provide a Discount on Non-Section 251 Services is Unlawful

80. Qwest realleges and incorporates paragraphs 1 through 79 by reference as if set forth fully herein.

81. Section 252(a) of the Act, as articulated on October 4, 2002, in response to Qwest's petition for a declaratory ruling, requires ILECs to file for approval with State commissions all agreements to provide interconnection services as defined in Section 251(b) and (c), which includes: transmission and routing of local telephone traffic; terms related to resale, number portability, dialing parity, access to rights of way, collocation and reciprocal compensation; and the network elements necessary to carryout any of the above services. On the other hand, agreements for non-Section 251 services that CLECs and ILECs provide to one another—such as switched access charges (charges that long distance carriers pay to local carriers to terminate long distance calls), or interstate switched access charges—are not subject to the filing and approval process under Sections 252(a) and (e).

82. The Commission ordered Qwest to provide an 18-month retrospective discount on all Minnesota services. While *Penalty Order II* excludes interstate switched access charges from this discount, the order still includes other non-Section 251 services, such as intrastate switched access, in the discount. The sole basis for liability in the Commission's Orders was the failure to file agreements under Section 252(a), and the discrimination that resulted from that failure to file. The order to provide a discount on non-Section 251 services -- to which the Section 252(a) filing requirement does not apply -- based upon a failure to file an interconnection agreement under Section 252(a) violates 47 U.S.C. §§ 251 and 252.

83. The restitutional remedy to provide non-Section 251 services is arbitrary, capricious, not supported by substantial evidence, and, thus, unlawful under state law because the Commission did not receive legally sufficient evidence to support the imposition of restitutional remedies and did not consider the legal elements necessary to support imposition of equitable restitutional remedies.

84. The order to provide non-Section 251 services based upon terms contained in an unapproved interconnection agreement to all CLECs violates the filed rate doctrine as described in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2766 (1990), among other cases.

85. Qwest is entitled on each of the above bases to judgment under 28 U.S.C. § 2201(a) declaring that the portion of ordering paragraph 3a of the *Penalty Order* (and order paragraph 1a of *Penalty Order II*), requiring Qwest to provide a 10% discount on non-Section 251 services, is invalid and to an injunction prohibiting the enforcement of ordering paragraph 3a of the *Penalty Order*.

COUNT II

The Order to Provide a Discount on Section 251 Services is Unlawful

86. Qwest realleges and incorporates paragraphs 1 through 85 by reference as if set forth fully herein.

87. The restitutional remedy to provide a 10% retrospective discount to CLECs on Section 251 services regardless of whether the CLECs could satisfy all related terms to the 10% discount conflicts with 47 U.S.C. §§ 251 and 252 -- and specifically 47 U.S.C. § 252(i) -- and the federal regulatory scheme ensuring non-discrimination in the provision of local telephone services, and is, thus, pre-empted. U.S. Const. art. VI.

88. The restitutional remedy to provide a 10% retrospective discount to CLECs on Section 251 services is arbitrary, capricious, and not supported by substantial evidence because the Commission never received any evidence to support restitutional remedies and never considered the necessary legal elements under state law to support restitutional remedies.

89. The restitutional remedy to provide a 10% retrospective discount to CLECs on Section 251 services violates the filed rate doctrine, as described in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2766 (1990), among other cases.

90. Qwest is entitled on each of the above bases to judgment under 28 U.S.C. § 2201(a) declaring ordering paragraph 3a of the *Penalty Order* (and ordering paragraph 1a of *Penalty Order II*), which requires Qwest to provide a 10% discount on 251 services, invalid and to an injunction prohibiting the enforcement of ordering paragraph 3a of the *Penalty Order*.

COUNT III

The Imposition of the $25.955 Million Penalty Is Unlawful

91. Qwest realleges and incorporates paragraphs 1 through 90 by reference as if set forth fully herein.

92. The Commission's decision to set the monetary penalty amount at $25.955 million was contrary to the requirements of Sections 251 and 252 of the Act, and as such is pre-empted by the Act. The record establishes that the Commission selected a total penalty amount designed to coerce Qwest into accepting restitutional remedies that did not conform to the requirements of Section 252(i) opt-in process in the Act. Thus, the penalty amount was selected specifically to undermine the Section 252(i) opt-in process outlined by the federal regulatory regime. Any state action that is directly contrary to the express requirements of federal law and regulations is pre-empted. The Commission's selection of the penalty amount in this situation

violates 47 U.S.C. §§ 251 and 252, and specifically 47 U.S.C. § 252(i), and is therefore pre-empted. U.S. Const. art. VI.

93. The Commission's decision to set the monetary penalty amount at $25.955 million was not based upon the enumerated elements in Minn. Stat. § 237.462 for determining the amount of monetary penalties. The record demonstrates that the Commission selected a total penalty amount designed to coerce Qwest into accepting other remedies of questionable legal validity rather than upon the application of the nine state statutory factors to each agreement. The penalty amount is arbitrary, capricious, and unsupported by substantial evidence; and, thus, is invalid under Minn. Stat. § 237.462.

94. Because the total penalty amount, and the penalty amount attributable to each agreement, vastly exceeds the harm caused and the seriousness of the violations, the $25.955 million penalty violates the excessive fines clause of the United States Constitution. U.S. Const. amend. VIII.

95. The imposition of the $25.955 million penalty was dependent upon a knowing and intentional violation of law and a finding that discriminatory harm had occurred. The finding that for each and every agreement Qwest knowingly and intentionally violated the filing requirement of 47 U.S.C. § 252(a) -- and that the failure to file violated the non-discrimination requirements of 47 U.S.C. § 251 and Minn. Stat. § 237.09, § 237.60 subd. 3, and § 237.121 subd. 5 causing actual discriminatory harm occurred -- violated the fair notice doctrine, and was arbitrary, capricious, and not supported by substantial evidence. U.S. Const. amend. XIV.

96. The Commission findings, both under federal and state law, that Qwest's failure to file the interconnection agreements resulted in discrimination and harm to the CLECs are

based on a legally incorrect *per se* theory of discrimination that is contrary to 47 U.S.C. §§ 251 and 252 and, particularly, 47 U.S.C. § 252(i).

97. Qwest is entitled on each of the above bases to judgment under 28 U.S.C. § 2201(a) declaring that ordering paragraph 1 of the *Penalty Order*, requiring Qwest to pay a penalty of $25,955,000, is invalid and to an injunction prohibiting the enforcement of the $25,955,000 penalty.

COUNT IV

The Order to Pay $13 and/or $16 per-line Credits to Compensate CLECs for Lost Revenues Caused by Inaccurate Daily Usage Information is Unlawful

98. Qwest realleges and incorporates paragraphs 1 through 97 by reference as if set forth fully herein.

99. The restitutional remedy to provide $13 and $16 credits per platform line for each month that Qwest failed to provide accurate daily usage information to the CLECs for the period that the respective agreements were in effect without regard to whether the CLECs could satisfy all related terms to the per-line credits -- including the fact that there was reliance on a manual process for providing the information, inaccurate records, a process to exchange information between the CLEC and ILEC to determine the actual usage information, and offsets to the per-line credits based on that actual usage information -- conflicts with 47 U.S.C. § 252(i) and the federal regulatory scheme ensuring non-discrimination in the provision of local telephone services, and is, thus, pre-empted. U.S. Const. Art. VI.

100. The restitutional remedy to provide $13 and $16 credits per platform line for each month that Qwest failed to provide accurate daily usage information to the CLECs is arbitrary, capricious, and not supported by substantial evidence because the Commission never

received any evidence to support restitutional remedies and never considered the necessary legal elements under state law to support restitutional remedies.

101. The restitutional remedy to provide $13 and $16 credits per platform line for each month that Qwest failed to provide accurate daily usage information to the CLECs based upon terms contained in an unapproved interconnection agreement violates the filed rate doctrine, as described in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2766 (1990), among other cases.

102. Qwest is entitled on each of the above bases to judgment under 28 U.S.C. § 2201(a) declaring that ordering paragraph 3b of the *Penalty Order* (and order paragraph 1b, 3b of *Penalty Order II*) is invalid and to an injunction prohibiting the enforcement of ordering paragraph 3b of the *Penalty Order*.

COUNT V

The Order to Pay $2 per Access Line to Compensate CLECs for Terminating Qwest's IntraLATA Toll Traffic is Unlawful

103. Qwest realleges and incorporates paragraphs 1 through 102 by reference as if set forth fully herein.

104. Qwest's purchase of terminating access services from a CLEC is not a Section 251 service, and thus not subject to the Section 252(a) filing requirement. Thus, the order to provide a $2 per access line credit, offset by payments collected from Qwest for those access lines, based upon a failure to file an interconnection agreement under Section 252(a) violates 47 U.S.C. §§ 251 and 252.

105. The restitutional remedy to provide non-Section 251 services is arbitrary, capricious, not supported by substantial evidence, and, thus, unlawful under state law because the Commission did not receive legally sufficient evidence to support imposition of restitutional

remedies and did not consider the legal elements necessary to support imposition of equitable restitutional remedies.

106. The restitutional remedy to provide non-Section 251 services based upon terms contained in an unapproved interconnection agreement violates the filed rate doctrine, as described in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2766 (1990), among other cases.

107. Qwest is entitled on each of the above bases to judgment under 28 U.S.C. § 2201(a) declaring that ordering paragraph 3b of the *Penalty Order* (and order paragraph 1b, 3b of *Penalty Order II*) is invalid and to an injunction prohibiting the enforcement of ordering paragraph 3a of the *Penalty Order*.

<u>COUNT VIII</u>

The Conduct of the Proceedings Violated Qwest's Right to Due Process

108. Qwest realleges and incorporates paragraphs 1 through 116 by reference as if set forth fully herein.

109. The numerous and repeated procedural irregularities throughout the course of the liability proceeding -- including but not limited to the extensive reliance on fact testimony from an expert/co-counsel and the extensive reliance on hearsay testimony -- violate fundamental notions of fairness and justice so as to violate Qwest's right to due process. U.S. Const. Amend. XIV.

110. Qwest is entitled on the above basis to judgment under 28 U.S.C. § 2201(a) declaring that the *Liability Order*, *Penalty Order*, and *Penalty Order II* are invalid and to an injunction prohibiting the enforcement of the *Liability Order*, *Penalty Order*, and *Penalty Order II*.

PRAYER FOR RELIEF

WHEREFORE, pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331, 2201-02, Qwest respectfully requests that this Court grant the following relief:

1. Judgment declaring that the actions and the determinations of the Commission described in the foregoing counts violate the Act, FCC regulations, due process, and Minnesota law.

2. An injunction prohibiting all Defendants from taking any action to enforce the unlawful provisions of the Commission determinations challenged in this Complaint.

3. Such other and further relief as the Court deems just and reasonable.

Dated this 19th day of June

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